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March 19, 2019

Agency of Human Services  
Medicaid Policy Unit  
280 State Drive, Center Building  
Waterbury, VT 05671-1000

Re: GCR Proposed Policy 18-126: Health Benefits Eligibility & Enrollment Rules Update  
HBEE Part Eight: State Fair hearings and Expedited Eligibility Appeals

Vermont Legal Aid submits the following comments in response to the proposed changes to Part Eight of the Health Benefits Eligibility and Enrollment (HBEE) rules. VLA generally supports the addition of the right to an expedited State Fair hearing for Medicaid eligibility decisions. With the proposed changes, there is now a right to an expedited fair hearing for both Medicaid coverage and eligibility decisions. This change provides for a more coherent and consistent appeal framework and complies with federal regulations.

### **80.04 Request for a State fair hearing (b)(4)**

#### **AHS proposed language:**

“Prior to referring an individual’s request for a State fair hearing to the Human Services Board, AHS may take up to 15 days to review the individual’s appeal, and if AHS determines that the individual is entitled to relief, AHS will grant the individual relief and will send the individual a new notice of decision if eligibility is redetermined.”

#### **Comment:**

VLA is concerned about the proposal to allow AHS to take up to 15 days to review an individual’s appeal before referring the request to the Human Services Board (HSB). Although it may be efficient for AHS to review the fair hearing requests prior to sending them to the HSB, the 15 day time frame is too long, and will extend the fair hearing process. Under 45 CFR 155.520(d)(3), AHS must transmit the appeal “upon receipt” of the request. VLA proposes that AHS transmit the fair hearing request to HSB while it engages in a 10 day internal review period. AHS can simultaneously review the appeal internally while the case is docketed at the HSB. The fair hearing rules also already provide for agency review of a pending case under 1000.3(G).

In addition, the applicable regulation, 45 CFR §155.520, also provides two rights that should be included in the rule. These are the 1) right for appellant to cure a defective request for a Fair Hearing, and 2) a “good cause” permission for the appeal to go forward if the request for the Fair Hearing is submitted late. VLA requests that these important protections be included in this section of the rule.

## **80.05 AHS Secretary's decision and further appeal**

### **AHS Proposed Language:**

“(i) Adopt the Human Services Board’s decision or order, except that the Secretary may reverse or modify a decision or order of the Human Services Board if:  
(A) The Human Services Board’s findings of fact lack any support in the record; or  
(B) The decision or order *implicates the validity or applicability* of any agency policy or rule.”

### **Comment:**

The proposed language does not reflect the statutory changes to 3 V.S.A. 3091(h)(1)(A)(ii). The proposed regulation should copy the new statutory language:

(ii) the decision or order *misinterprets or misapplies* State or federal policy or rule

The regulation should be revised in light of this change to Vermont law.

## **80.07 Expedited eligibility appeals; expedited internal appeals and expedited State Fair Hearings**

### **80.07(c)(5) No right to State fair hearing on denial**

### **AHS Proposed Language:**

“A denial of a request for an expedited eligibility appeal is not a basis for review by the Human Services Board.”

### **Comment:**

This language is confusing. We believe it would be clearer to say: “A denial of a request for an expedited eligibility appeal is not an *independent* basis for review by the Human Services Board.”

### **80.07 (e)(1)(iii) Procedures**

### **AHS Proposed Deletion:**

~~(ii) The individual’s rights during the expedited administrative appeal process, including the rights: to review the appeal record, including all documents and records considered by the person deciding the expedited administrative appeal; to be present at the hearing; to be accompanied or represented during the hearing; to present oral and written evidence; to present argument; and to pursue further review before the Human Services Board if the individual is dissatisfied with the outcome of the expedited administrative appeal.~~

### **Comment:**

While many of these rights are preserved in the non-deleted part of 80.07 (e)(1)(iii), the opportunities to see the documents and records relied upon by the agency in making its initial denial has not been preserved in the internal agency review. This is an essential due process right. Also, the right to have witnesses and present evidence has also been deleted, and only

replaced with the right to “present facts”. It should be made clear to the appellant that they can provide written documents, and witnesses as scheduling permits.

Specifically, 45 CFR 155.535 sets out requirements for a hearing, which includes the right to review documents and present witnesses. The appellant should also have the option to attend in person and not by phone.

Thank you again for the opportunity to comment. We appreciate the due process protections in expedited Fair Hearings.

Respectfully Submitted,

Marjorie Stinchcombe, Office of Vermont Health Advocate  
Barbara Prine, Disability Law Project  
Michael Benvenuto, Elder Law Unit